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No. 84-158

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

Rocky B. Fisheries, Inc., an Oregon corporation, Johnnie Brown and David Brown,

Appellants,

v.

North Bend Fabrication & Machine, Inc., an Oregon corporation; John Dudrey with his law firm partners Floyd A. Fredrickson, Lloyd W. Weisensee, Peter C. McCord and Jay M. Fountain; Lawrence F. Finneran with his law firm partners Jerry O. Lesan and Kirk Johansen,

Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

REPLY

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List of Parties

The List of Parties appears at page (ii) of the Jurisdictional Statement.

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REPLY

Reply to Appellees' Motion to Dismiss or Affirm

The questions presented by this appeal are substantial. This appeal

should not be dismissed. The decision of the Oregon Court of Appeals repudiates fundamental due process principles. The decision should not be affirmed.

ARGUMENT

> "At a minimum due process requires adequate notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 313-16, 70 S Ct 652, 94 L Ed 865 (1950). Rocky B. Fisheries v. No. Bend Fab., 66 Or 625, 632, 676 P2d 319, rev den 297 Or 82 (1984)." Hornbuckle v. Harris, 9 Or App 272, ___ P2d ____ (1984).

It is disturbing, as well as ironic, that the Oregon Court of Appeals has cited the instant case of Rocky B. Fisheries for the proposition that the United States Constitution requires adequate notice and an opportunity to be heard. Instead, this case stands for the proposition that due process rights can be denied in the state of Oregon. The decision of the Oregon Court of Appeals allows the summary, ex parte, prejudgment

seizure of a fishing boat, upon which the fisherman's livelihood is dependent, for non-admiralty, original construction liens, without any:

a. Pre-seizure notice;
b. Pre-seizure hearing;
c. Extraordinary situations existing;
d. A writ issued by a judge;
e. Sworn affidavits of the claimants;
f. Post seizure hearing; or
g. Adequate bond being posted.

I. Pre-Seizure Notice.

Appellees concede that appellants received no notice prior to the seizure of the fishing boat. "Neither the complaint, the order nor the warrant was served upon the appellants before the seizure." (Appellees' Motion to Dismiss or Affirm, p. 7). "The owner of the vessel was not given notice prior to its seizure." (Id., p. 29). However, appellees argue that pre-seizure notice is not necessary, because seizure itself

provides constitutionally adequate notice in an action in rem.

This principle was specifically rejected in Green v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, 1878-1879, ____ L. Ed. 2d ____ (1982):

> "'[A]ll proceedings, like all rights, are really against persons.' . . . [I]t will not suffice to recite that because an action is in rem, it is only necessary to serve notice upon the thing itself." 102 S. Ct. at 1878-1879.

As pointed out in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 94 L. Ed. 865 (1950), the categorization of an action as in rem, quasi in rem or in personam, does not modify the type of notice required. Whenever a person's property interest is adjudicated, notice must be given.

This court discussed in some detail in Mullane the type of notice that must be given. At a minimum, the notice must be "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314, 70 S. Ct. at 657. In this case, the only notice was seizure. Appellants, who were very interested parties, were not apprised that they had any right to present any objections to a court of law.

II. Pre-Seizure Hearing.

As explained by Justice Rehnquist in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 1914, 68 L. Ed. 2d 420 (1981), predeprivation notice and hearing protect against wrongful deprivation:

> "In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check the possibility that a wrongful deprivation would occur." 451 U.S. at 538, 101 S. Ct. at 1914.

In the present case there was no pre-seizure notice or hearing. The deprivation was in fact wrongful. The pleadings establish that the work of appellee North Bend was not related to the original construction of the boat. The boat was launched,[1] documented and licensed in November of 1979. Appellee North Bend provided services and materials from December, 1979 to May, 1980. Had appellants been given predeprivation notice and hearing, they could have presented their arguments to the court that the deprivation would be wrongful, and the deprivation would not have occurred.

III. Extraordinary Situations.

There are certain "extraordinary

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[1]The complaint incorrectly states that the boat was launched on January 10, 1980 (App-11 to Motion to Dismiss).

situations" that would justify a postponement of notice and the opportunity for a hearing. Fuentes v. Shevin, 407 U.S. 67, 90-91, 92 S. Ct. 1983, 1999-2000, 32 L. Ed. 2d 556 (1972); Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 26 L. Ed. 2d 113 (1971). As this court explained in Fuentes:

> "These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of a legitimate force; the person initiating the seizure has been a government official responsibile for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 90-91, 92 S. Ct. at 1992-2000. [Emphasis added.]

The only "extraordinary situation" which appellees could suggest is that a

boat can be sailed. This situation does not rise to the "truly unusual" level as required by this court in Fuentes. Logic dictates that there is no reason to distinguish a boat from any other form of movable personal property.

IV. Procedural Safeguards -- Sworn Affidavits of Claimants; Meaningful Judicial Participation and the Issuance of the Writ.

There were no sworn affidavits to support the complaint. The complaint consisted of mere conclusiory allegations. As appellees concede, the complaint was not verified. (Appellees' Motion to Dismiss or Affirm, p. 28). The court in the instant case issued a writ in the absence of all procedural safeguards to prevent mistake. There was no meaningful judicial participation in the issuance of the writ. There is even error evident on the face of the writ; it

recites that the complaint was verified when it was not (App. 8 to Motion to Dismiss).

V. Post-Seizure Hearing.

The Oregon Court of Appeals has attempted to engraft upon ORS 783.070 a provision for a post-seizure hearing, which would allow the property owner to contest the validity of the seizure. However, ORS 783.070 merely permits a boat owner to have the vessel released if the property owner posts the bond. There is no provision for a hearing to contest the validity of the seizure.

In the present case, there was no notice given to appellants of the opportunity for any post-seizure hearing. Appellants were served with no papers whatsoever advising them that a hearing could occur. The judicially-legislated right to a hearing can be no more than

illusory if the parties have no notice of it.

Appellees emphasize the fact that, under the principles of Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 1895 (1974), a statutory scheme which does not provide either notice or hearing prior to seizure still may satisfy the requirements of due process. However, appellees ignore that fact that, when there is no pre-seizure notice or hearing, Mitchell requires other procedural safeguards not present in this case. Mitchell requires pre-seizure safeguards against mistake and an appropriate post-seizure hearing under such circumstances.

Under the Louisiana sequestration statute in Mitchell, bare conclusory claims of lien do not suffice. Specific facts must be shown by verified petition or affidavit. 416 U.S. at 616, 94 S. Ct.

at 1904. Judicial involvement in the issuance of the writ must be significant:

> "[T]he requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsuperivsed mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the procedure from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking." 416 U.S. at 616-7, 94 S. Ct. at 1904-5.

Under the Louisiana sequestration statute, post-seizure safeguards are also required. Louisiana law "expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.'" 416 U.S. at 618, 94 S. Ct. at 1905. The burden of proof is on the claimant. There is no economic burden upon the property owner to post a bond.

Even if this Court accepts the position of the Oregon Court of Appeals that the post-seizure bond hearing is really a post-seizure hearing on the merits, there still must be additional protections against mistake both prior to seizure and at the post-seizure hearing. All such protections were lacking in this case. There was no verified complaint. There was no full and immediate hearing on the merits in which the burden was placed upon the claimant. Even under the construction of the seizure statute by the Oregon Court of Appeals, the statutory scheme provides insufficient due process protections.

VI. Adequate Bond Being Posted.

In the instant case, a $10,000 bond was posted to protect the sheriff of Coos County on the seizure of a boat worth $600,000. The court did not participate

meaningfully in the determination of the amount of the bond. The unverified complaint does not even specify the value of the boat; it merely itemizes the debt as $5,410.04. There were no affidavits submitted as to value. The record provides no support to justify the choice of the inadequate $10,000 figure for the bond. The statutory scheme provides no safeguards to ensure the adequacy of the bond.

CONCLUSION

The Oregon Court of Appeals has repudiated fundamental due process principles. Due process requires adequate notice and an opportunity to be heard. Mullane, supra. Neither was had in the present case.

The only due process protection appellees were given is the right to a judicially-legislated, post-seizure bond hearing. Even as construed by the Court

of Appeals, this hearing does not satisfy constitutional due process requirements. It is neither full nor immediate. It is not a hearing on the merits. The burden of proof is not placed upon the lien claimant. Instead of providing the property owner with an immediate forum for a full hearing on the merits of the claim, this hearing places the economic burden on the property owner of posting a bond. The property owner is required to buy his due process.

In addition, the statutory scheme requires no prior notice, no prior hearing, no adequate bond, no judicial review, no extraordinary situations, and no sworn affidavits of the claimant. This statutory seizure scheme is patently unconstitutional.

The questions presented by this appeal are substantial. Rocky B. Fisheries and its two shareholders urge

this court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

DATED this 7th day of September, 1984.

Respectfully submitted,

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